Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D–01–303 OF 1996
GOPAL SRI RAM, MOKHTAR SIDIN AND HAIDAR JJCA
25 JANUARY 2006

Constitutional Law — Preventive detention — Restricted residence order — Right of detained person — Allegation of unlawful detention — Detention already ended — Whether issue academic — Whether court should grant academic orders — Whether appellant could challenge validity of detention order by way of defence in criminal proceedings against him

The appellant was arrested on 20 September 1994 pursuant to a warrant of arrest issued by the respondent under s 2(i) of the Restricted Residence Act 1933. In a summons taken out before the High Court, the appellant challenged, by way of declaratory relief, his restricted residence at Mukim Dabong, Kuala Krai as being illegal and void on the ground that his arrest and the other action taken against him by the police immediately preceding his restricted residence were unlawful. The summons was dismissed by the learned judge. The appellant then appealed. Learned federal counsel for the respondent submitted that the appeal was academic since the restriction order made against the appellant was at an end. Counsel for the appellant however argued that if the appeal were to be dismissed out of hand, his client would suffer injury as he was facing charges for having breached the restriction order.

Held, dismissing the appeal with the rider that the dismissal was not to estop the appellant from challenging the order in question in the proceedings before the magistrate's court:

(1) The appeal was indeed academic. The subject matter of the appeal was the correctness of the restrictive residence order made against the appellant and to which he had been subject. That order having come to an end, there was no longer a valid lis before the court for adjudication. A court will not act in vain or grant academic declarations. There was therefore no alternative but to dismiss the appeal (see para 4).

(2) However there was the need to ensure that the appellant would not suffer an injustice merely because his appeal was academic. The appellant's fear was that he would be deprived of a defence to the charges he was facing for having allegedly breached the order for restricted residence made against him. That difficulty would be sufficiently averted by ensuring that no point of issue estoppel was to arise against him by reason of the dismissal of this appeal. That was the rider the court would add to the order dismissing the appeal (see para 5).

(3) The appellant need not have brought these proceedings at all. He could, in the criminal proceedings before the magistrate, have attacked the validity of the order made against him (see para 6). It is consonant with promotion of the rule of law as enshrined in art 8(1) of the Federal Constitution that the appellant be given an opportunity to challenge the validity of the administrative order made against him by way of defence to the criminal charges brought against him (see para 8).

[Bahasa Malaysia summary

Perayu telah ditangkap pada 20 September 1994 menurut satu waran tangkap yang dikeluarkan oleh responden di bawah s 2(i) Akta Kediaman Terhad 1933. Dalam satu saman yang dikemukakan di hadapan Mahkamah Tinggi, perayu telah mencabar, melalui relief deklarasi, kediaman terhad beliau di Mukim Dabong, Kuala Krai sebagai menyalahi undang-undang dan tidak sah atas alasan bahawa tangkapan beliau dan tindakan lain yang diambil terhadapnya oleh pihak polis sejurus selepas kediaman terhadnya adalah menyalahi undang-undang. Saman itu ditolak oleh hakim yang bijaksana. Perayu kemudiannya telah merayu. Peguam persekutuan bagi pihak responden berhujah bahawa rayuan itu bersifat akademik memandangkan perintah sekatan yang dibuat terhadap perayu telah luput. Peguam bagi pihak perayu bagaimanapun berhujah bahawa jika rayuan tersebut ditolak, anak guam beliau akan mengalami kerugian kerana beliau menghadapi pertuduhan kerana melanggar perintah sekatan.

Diputuskan, menolak rayuan tersebut dan penolakan itu tidak mengestopkan perayu daripada mencabar perintah yang dipersoalkan dalam prosiding di hadapan mahkamah majistret:

(1) Rayuan tersebut bersifat akademik. Perkara pokok rayuan tersebut adalah ketepatan perintah kediaman terhad yang dibuat terhadap perayu dan yang mana beliau menjadi subjek. Perintah yang telah tamat itu tidak lagi sah di hadapan mahkamah untuk diadili. Mahkamah tidak akan bertindak dengan sia-sia atau memberikan deklarasi akademik. Oleh itu tiada alternatif tetapi untuk menolak rayuan tersebut (lihat perenggan 4).

(2) Namun perlu dipastikan bahawa perayu tidak mengalami ketidakadilan hanya kerana rayuan beliau bersifat akademik. Perayu bimbang beliau terkilan suatu pembelaan terhadap pertuduhan-pertuduhan yang beliau hadapi kerana dikatakan telah melanggar perintah untuk kediaman terhad yang dibuat terhadapnya. Kesukaran itu dapat dihindarkan dengan memastikan bahawa tiada persoalan estopel timbul terhadap beliau oleh sebab penolakan rayuan ini. Persoalan inilah yang mahkamah ingin sertakan dalam perintah penolakan rayuan tersebut (lihat perenggan 5).

(3) Perayu tidak perlu memulakan prosiding tersebut. Beliau patut, dalam prosiding jenayah di hadapan majistret, menyoal kesahan perintah yang dibuat terhadapnya (lihat perenggan 6). Ia sejajar dengan galakan menggunakan rukun am sepertimana yang diperuntukkan dalam perkara 8(1) Perlembagaan Persekutuan bahawa perayu diberikan peluang untuk mencabar kesahan

perintah pentadbiran yang dibuat terhadapnya melalui pembelaan terhadap pertuduhan jenayah yang dibuat terhadapnya (lihat perenggan 8).]

Notes

For a case on restricted residence order, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1986.

Cases referred to

Barnato, Re [1949] Ch 258 (refd)
Boddington v British Transport Police [1999] 2 AC 143 (refd)
Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37 (refd)

Legislation referred to

Federal Constitution art 8(1)
Restricted Residence Act 1933 s 2(i)

Appeal from: Originating Summons No 24–245 of 1996 (High Court, Kota Bahru)

Haresh Mahadevan (Aris Rizal Christopher Fernando & Co) for the appellant.
Abdul Alim bin Abdullah (Mohd Abazafree bin Mohd Abbas with him) (Attorney Generals Chambers)) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The facts of this case are fairly simple. On 6 September 1994, the Deputy Home Minister issued a warrant of arrest for the arrest of the appellant pursuant to s 2(i) of the Restricted Residence Act 1933. The appellant was arrested on 20 September 1994. He was taken to the Klang Police Station and then sent to Pudu Prison where he was detained for a further 30 days. On 19 October 1994, the Minister ordered that the appellant be detained for three months at Mukim Dabong, Kuala Krai, Kelantan effective from the date of the order. However, the appellant was only brought to the Dabong Police Station on 20 October 1994 where he was detained for several hours. The appellant was then instructed to spend four nights at the house of the OCS, Sergeant Major Ismail before being released at Mukim Dabong, Kuala Krai, Kelantan to commence his term of restricted residence there.

[2] In a summons taken out before the High Court, the appellant challenged, by way of declaratory relief, his restricted residence at Mukim Dabong, Kuala Krai as being illegal and void on the ground that his arrest and the other action taken against him by the police immediately preceding his restricted residence were unlawful. That summons was dismissed by the learned judge. The appellant then appealed to us.

[3] When the appeal was called on for hearing, learned senior federal counsel for the respondent rose to his feet and very properly informed us that the restriction order made against the appellant was at an end and that the appeal was accordingly academic. Learned counsel for the appellant however argued that if the appeal were

to be dismissed out of hand, his client would suffer injury as he was facing charges for having breached the restriction order. All that counsel wanted was some form of protection for his client that would not deprive him of a defence to the charges framed against him.

[4] We were entirely in agreement with learned senior federal counsel that the appeal was indeed academic. The subject matter of the appeal was the correctness of the restrictive residence order made against the appellant and to which he had been subject. That order having come to an end, there was no longer a valid lis before us for adjudication. Any views we may express about the validity or otherwise of the order would be wholly academic in the circumstances of this case. It will simply have no effect at all. It will mean that we would act in vain. And it is settled law that a court will not act in vain. Equally it is also settled that the court will not grant academic declarations. See *Re Barnato* [1949] Ch 258. There is therefore no alternative but to dismiss this appeal.

[5] But we equally recognised the need to ensure that the appellant will not suffer an injustice merely because his appeal is academic. The appellant's fear is that he will be deprived of a defence to the charges he is facing for having allegedly breached the order for restricted residence made against him. That difficulty will be sufficiently averted by ensuring that no point of issue estoppel is to arise against him by reason of the dismissal of this appeal. That is the rider we add to the order we made dismissing the appeal.

[6] We may add that the appellant need not have brought these proceedings at all. He could, in the criminal proceedings before the magistrate, have attacked the validity of the order made against him. As Abdoolcader J said in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 736, Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.
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> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' (*Birmingham (Churchwardens and Overseers) v Shaw* (1849) 10 QB 868, 880; 116 ER 329 (at p 880 per Denman CJ). In *Barnard v National Dock Labour Board* [1953] 2 QB 18, 34 it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at p 34 per Singleton LJ). *Ridge v Baldwin* [1964] AC 40 is to the same effect.

[7] In *Boddington v British Transport Police* [1999] 2 AC 143, Lord Slynn of Hadley said:

> that it is open to a defendant to raise in a criminal prosecution the contention that a by law or an administrative act undertaken pursuant to it is ultra vires and unlawful and that if he establishes that he has committed no crime. For magistrates to be required to convict when they are satisfied that an administrative act is unlawful is unacceptable.

[8] Likewise, we would say that it is consonant with promotion of the rule of law as enshrined in art 8(1) of the Federal Constitution that the instant appellant be given an opportunity to challenge the validity of the administrative order made against him by way of defence to the criminal charges brought against him. See the speeches of Lord Irvine of Lairg LC and Lord Steyn in *Boddington*'s case.

[9] For the reasons already given, the appeal was dismissed with the rider that the dismissal was not to estop the appellant from challenging the order in question in the proceedings before the magistrate's court.

Appeal dismissed.

Reported by Loo Lai Mee